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# TREATY WITH BELGIUM ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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JULY 31 (legislative day, JANUARY 3), 1989.—Ordered to be printed

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

## REPORT

together with

## ADDITIONAL VIEWS

The Committee on Foreign Relations, to which was referred the Treaty between the United States of America and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 28, 1988, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

### BACKGROUND

The negotiation of mutual legal assistance treaties (MLAT's), treaties designed to obtain evidence from abroad, represents a relatively new development in the area of international law enforcement. Negotiations on the first MLAT began over 17 years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. In 1973, an MLAT between the United States and Switzerland was signed; it entered into force in 1977. In the first 8 years in force, over 300 requests from the United States had been handled by Swiss authorities. The treaty clearly has been and continues to be of assistance to American officials, but an extensive right of appeal available to those affected by American requests and the Swiss refusal to permit information provided by them to be used in tax evasion prosecutions have rendered the treaty less than a perfect instrument.

Since the MLAT with the Swiss entered into force, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have a number of executive agreements in the same vein with the



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Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step towards agreement on a more expansive mutual assistance treaty. In addition, MLAT's have been negotiated with Colombia and Morocco, but each has been ratified by the United States only. At the present time, MLAT's with Canada, Thailand, the Bahamas, the Cayman Islands, Mexico, and Belgium have been signed but not yet ratified by the United States.

The traditional procedure for obtaining evidence from foreign countries is by the cumbersome, time-consuming, and extremely limited process of letters rogatory, a process whereby written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance are made. Letters rogatory have been found lacking in that: (1) They fail to have the element of compulsion; (2) they produce evidence which is inadmissible in the requesting country's courts; and (3) the requested nation often lacks sufficient political will or incentive to comply with the other country's request.

MLAT's are a significantly more effective means of obtaining legal assistance. An MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. An MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. In an MLAT, the United States has the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. Finally, MLAT's are designed to streamline and make more effective the process of obtaining evidence. Each treaty provides for a central authority, the Justice Departments of the two countries, which is responsible for making and executing requests under the treaty.

MLAT's should add an element of standardization and uniformity to criminal procedures worldwide. The ability of criminals to hide the evidence and fruits of their crime will be diminished with the enhancement of the capacity of law enforcement agencies to cooperate across national boundaries in the investigation and prosecution of those crimes.

The treaty between the United States and the Kingdom of Belgium on mutual legal assistance in criminal matters was signed on January 28, 1988. With Belgium, the United States had an opportunity to negotiate an MLAT with a European country that is a major commercial and financial center, and in doing so, to set the stage for MLAT negotiations with neighboring countries with legal systems quite similar to that of Belgium.

## PURPOSE

The treaty provides for assistance in "all matters relating to the investigation, prosecution, and suppression of offenses." The treaty thereby provides for assistance at the investigative stage (such as grand jury proceedings), as well as after formal charges have been filed. It also includes assistance for proceedings technically of a civil or administrative nature which are related to criminal prosecutions, such as forfeiture proceedings or a disgorgement action in a Securities and Exchange Commission case.

The treaty establishes the principle that assistance is available without regard to "dual criminality," that is whether the assistance requested relates to an act which would have constituted some criminal offense in the requested state, except a search and seizure in Belgium. The exception is necessary because Belgium has a specific statutory law requiring dual criminality in order for a search and seizure to be conducted within Belgium for the benefit of another country.

The kinds of assistance provided for under the treaty include but are not necessarily limited to: Provision of documents, records, and evidence; executing requests for searches and seizures; obtaining witness testimony; and locating, tracing, immobilizing, seizing and forfeiting proceeds of crime.

## COMMITTEE COMMENTS

The committee believes that Mutual Legal Assistance Treaties (MLAT's) are a key element in the U.S. strategy to improve international cooperation against crime, particularly narcotics-related offenses such as RICO, CCE, and money laundering. The treaty with Belgium represents our first MLAT with a European country that is a major commercial and financial center, and sets the stage for MLAT negotiations with neighboring countries with legal systems quite similar to those of Belgium.

During committee consideration of the treaty with Belgium, as well as the other five pending MLAT's concern was expressed that the bilateral treaties could in some manner abridge the constitutional rights of United States citizens. A reservation was proposed to each of the MLAT's asserting that "nothing in this Treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," *Reid* v. *Covert,* 354 U.S. 1, (1957). Thus, the committee viewed the proposed reservation as unnecessary. As a matter of domestic law, the Constitution necessarily circumscribes the Government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the treaties whether or not such reservation were included in the instrument of ratification.

None of the MLAT's requires or authorizes legislation or other action which is prohibited by the Constitution, nor could they properly do so. The reservation thus adds nothing in the way of constitutional protection.

In addition, our treaty partners might well object because it is passed as a reservation with respect to our intended implementation of the treaty and will be expressly included in the instrument of ratification. Each of our treaty partners would have to accept it. Some of the pending six might not, and others with whom the United States wants to negotiate in the future may decline to do so if such a reservation is added at the time of ratification. More likely, some might insist on adding a reciprocal reservation, and that could limit the usefulness of the treaty for our purposes since constitutional limitations have different effects in different legal systems.

The reservation also raised dangerous litigation risks. It could provide a target for defendants as well as the targets of investigations to interpose specious challenges to MLAT requests where they could not now do so. They could also in effect substitute the actions of a foreign government for our own constitutional requirements when they carry out an MLAT request in their own country by permitting defendants to move to exclude evidence produced under an MLAT request because the procedure followed by the foreign government did not comport with those required by the Constitution.

Finally, the reasons why a similar reservation was adopted with regard to the Genocide Convention are inapprorpriate here. Unlike the Genocide Convention, the MLAT's do not create new grounds for which U.S. citizens can be tried. Instead, they establish mechanisms by which evidence can be obtained overseas in a form admissible in U.S. courts through such means as service of process, taking of testimony, admission of documentary evidence such as bank records, and the execution of requests for searches and seizures.

These are essentially procedural matters, already well regulated by the courts. In roughly a decade's experience under the existing MLAT's, no significant constitutional questions have arisen that would require inclusion of the reservation.

Finally, concern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under this treaty.

## Committee Action

### 100th Congress

On April 20, 1988, the committee held its first hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was heard from administration witnesses, Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

On June 14, 1988, the committee held another hearing at which the following public witnesses presented testimony: Mr. Bruce Zagaris, Attorney, Berliner & Maloney, Washington, DC; Mr. Robert L. Pisani, Executive Director, International Legal Defense Counsel,

Philadelphia, PA; Mr. Philip White, Attorney, Adam, McCullough & Beard, Washington, DC.

The committee met to consider the Treaty between the Government of the United States of America and the Kingdom of Belgium on Mutual Assistance on September 27, 1988. Senator Helms offered a reservation to each of the pending treaties asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was defeated by a 3 to 15 vote with Senators Helms, Pressler, and Trible voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Evans, and McConnell voting in the negative.

The committee voted by voice vote with a quorum present to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent.

101ST CONGRESS

On April 18, 1989, the committee held a hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was given by Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Edward Dennis, Assistant Attorney General, Criminal Division, Department of Justice.

On May 2, 1989, Commissioner William von Raab of the U.S. Customs Service testified before the committee on the mutual legal assistance treaties and other matters. The complete hearing record on this treaty as well as the other five MLAT's is printed as an appendix to the committee report on the treaty with Cayman Islands (Treaty Doc. 100–8).

The committee met to consider the Treaty between the United States of America and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters on July 25, 1989. Senator Helms offered a reservation to each of the pending treaties stating that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was rejected by a vote of 2 to 15 with Senators Helms and Pressler voting in the affirmative and Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, Robb, Lugar, Kassebaum, Boschwitz, McConnell, and Mack voting in the negative.

The committee voted 18 to 1 to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, Robb, Lugar, Kassebaum, Boschwitz, Pressler, Murkowski, McConnell, Humphrey, and Mack. Nays: Senator Helms.

## SECTION-BY-SECTION ANALYSIS

The following technical analysis, which was prepared by the U.S. negotiating team, constitutes the formal executive branch representation as to the meaning of this treaty and the obligations to be assumed by the United States under it:

# TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF BELGIUM ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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TECHNICAL ANALYSIS
MUTUAL LEGAL ASSISTANCE TREATY BETWEEN UNITED STATES AND BELGIUM

## INTRODUCTION

The following technical analysis of the Treaty on Mutual Legal Assistance in Criminal Matters, similar to treaties currently in force with Switzerland, Turkey, the Netherlands, and Italy[1]* and to treaties signed, but not yet ratified, with Canada, Mexico, Thailand, the United Kingdom concerning the Cayman Islands, and the Bahamas[2], was prepared by the U.S. delegation to those negotiations.

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* All notes follow the text.

## TECHNICAL ANALYSIS OF THE TREATY

### Article I -- SCOPE OF APPLICATION

The first paragraph of this Article, virtually identical to Article II(1) of the U.S. Mutual Legal Assistance Treaty (MLAT)[3] with Canada, establishes the basic obligation of the parties to provide assistance in "all matters relating to the investigation, prosecution and suppression of offenses." This obligation, which was intended to be as broad as possible, applies whether the case is still being investigated[4] or has already resulted in an indictment. It also includes assistance for proceedings technically of a civil or administrative nature which are related to criminal prosecutions, such as forfeiture proceedings.[5] Another example of such a civil or administrative proceeding is a disgorgement action in a Securities and Exchange Commission case. It was the intention of the Parties that neither the characterization of the proceeding nor the designation of the court in which the proceedings were brought would control whether assistance is available. Rather, the purpose of the proceeding is controlling; if the action is brought for the purpose of suppressing crime, assistance is available under the Treaty.

The second paragraph lists types of assistance the negotiators specifically discussed and intended to make available under the Treaty. Each of the listed items is discussed in detail hereinafter. The list is not exclusive, and other types of assistance not contrary to the provisions of the Treaty or prohibited by domestic law may be granted under the Treaty.

The third paragraph establishes the principle that assistance is available without regard to "dual criminality"[6] (i.e., whether or not the acts being investigated or forming the gravamen of the offense would have been illegal in the Requested State), "[u]nless otherwise provided by this Treaty." The latter provision was necessary because Belgium has specific statutory law requiring dual criminality in order for a search and seizure to be conducted within Belgium for the benefit of another country. See, the discussion of Article 7, Executing Requests for Search and Seizure. Thus, this provision eliminates dual criminality as a prerequisite for every form of assistance except a search and seizure in Belgium.

The term "offense" means any criminal violation punishable under the laws of the Requesting State regardless of the seriousness (grade, denomination, etc) of the offense. Any criminal violation, therefore, may serve as a basis for assistance. For the United States this includes federal offenses defined by 18 U.S.C. 2 as felonies, misdemeanors, or petty offenses.[7]

The fourth paragraph provides that the Treaty is for the benefit of the two Governments only. This is an express recognition that the Treaty is a law enforcement tool for use by the two states and is not intended to be utilized by nongovernment parties or institutions for purposes of discovery or otherwise. This is consistent with other mutual legal assistance treaties and reflects the Treaty's purpose -- to enhance the effectiveness of law enforcement authorities.[8] Government actions pursuant to the Treaty may benefit private parties (e.g., restitution to victims), but they remain actions controlled by the Governments to be used to effect law enforcement purposes. Private parties may continue to seek evidence in Belgium by means of letters rogatory, an avenue of international assistance that this Treaty leaves undisturbed. The paragraph also provides that the Treaty does not create a right for a defendant or other interested private party to obtain evidence, or a basis for such a person to argue for the suppression or exclusion of any evidence; nor does it create a basis upon which such a person could attempt to frustrate the execution of a request.[9] Thus, for example, a defendant may not seek to prevent the execution of a request seeking evidence or to suppress evidence provided pursuant to a treaty request on the basis that the provisions of the Treaty were not followed.

### Article 2 -- Locating or Identifying of Persons

Under this Article, commonly found in MLATs, the parties agree to "make thorough efforts"[10] to locate or determine the identity of persons specified in the request.

### Article 3 -- Serving Documents

The first paragraph of this Article provides that the Requested State agrees to serve judicial process and other

documents (e.g., a formal notice, summons, subpoena, writ) on persons and institutions located within its jurisdiction. The second paragraph provides that when the Requesting State wishes to have a document served requiring a response or appearance in the Requesting State, it must transmit the document to the Requested State early enough so that the person served will have a reasonable opportunity to comply. The third paragraph obligates the Requested State to return a proof of service to the Requesting State and specifies the form and content thereof.

During the negotiation of this and the next Article, the United States and Belgium specifically discussed whether this Article would provide the sole method for serving documents once this Treaty enters into force. Consistent with Article 19, the parties agreed that other methods of service may be used. Thus, the United States may, if it so desires, have its consular officers in Belgium serve, for instance, subpoenas issued under 28 U.S.C. 1783.

### Article 4 -- Appearance of Witnesses and Experts in the Requesting State

The Requested State is obliged by the first paragraph of this Article to contact "a [fact] witness or expert [witness]" whose presence in the Requesting State is "particularly necessary"[11] and to invite that person to travel to the Requesting State. The Requested State is also obliged to inform the Requesting State of the person's response promptly.

The second paragraph obligates the Requesting State to "appropriately" reimburse the witness for travel costs and subsistence. The negotiators intended the word "appropriately" to mean that which is normally paid pursuant to the domestic law of the Requesting State. The paragraph further provides that the Requesting State is obligated to advance necessary travel funds to the witness or expert, if requested, and that the funds may be provided through the embassy of the Requesting State.

Paragraph 3 clarifies that an appearance in the Requesting State under this Article is not mandatory and the invitation may be refused by the prospective witness without penalty. The Requested State is not obligated to compel the person to travel to the other country and the person is not otherwise obligated to

comply with the directions contained in a summons served on him under this Article.

**Article 5 -- Providing Information and Items in the Possession of Government Offices or Agencies**

This Article provides that "information and items" -- potential evidence in any form whatever -- in the possession of one government are made available to the other for criminal justice purposes. The term "government office or agency" includes executive, judicial, and legislative units of the federal, state, and local levels of government. Examples of the types of government documents and records to be made available are ship registrations, court records (including records of convictions), police records, immigration records, articles of incorporation, property records, hotel records, telephone records, passport applications, tax information, automobile registration information, driver's licence information, customs information and birth and death records.

Paragraph (a) obligates the Requested State to produce publicly available "information and items, including documents or records," upon demand. Paragraph (b) authorizes the Requested State to provide "information and items, including documents or records" in its possession but not publicly available "to the same extent and under the same conditions as [they] would be available" to domestic law enforcement and judicial authorities. Both Parties contemplate that copies, rather than originals, will suffice. See, Article 16(3).

In discussing paragraph (b), the United States delegation explained the significance of 26 U.S.C. 6103(k)(4) to the Belgian delegation, indicating that if the negotiators agreed that the Treaty covered tax offenses and was intended to be a vehicle by which tax information could be provided, then the United States could give Belgium assistance when it needed information in the possession of the IRS which otherwise could not be furnished. The Belgian delegation responded that the assistance it intended to grant included tax information which is available to domestic law enforcement authorities; indeed, Belgium made the point that it is prepared to use search warrants as necessary in order to obtain such information for the United States under this Treaty. The United States delegation was, therefore, satisfied with the understandings and agreements so as to make this Treaty a

"convention relating to the exchange of tax information" within the meaning of 26 U.S.C. 6103(k)(4).

As opposed to paragraph (a), the provision of assistance under paragraph (b) is discretionary. For the United States, the exercise of this discretion rests with the governmental unit in possession of the non-public information. However, the United States intends that discretion to deny assistance will be sparingly exercised and only for reasons clearly definable to the U.S. Central Authority. For Belgium, non-public information not voluntarily provided by the governmental unit in possession thereof must be secured by search warrant. See Article 7. As indicated above with respect to tax information, Belgium is willing to use search warrants where necessary. Thus, the discretionary determination will rest with the Belgian executing authority rather than with the governmental unit.

### Article 6 -- Taking Testimony and Producing Documents in the Requested State

The first paragraph of this Article obligates the Requested State to use court process, if necessary, to compel persons to appear, testify, and produce documents upon the request of the Requesting State.[12]

The reference in the first paragraph to execution of the request "in accordance with the requirements of the law of the Requested State" takes into account testimonial privileges and immunities, as well as procedural matters. The negotiators agreed that the Requested State should make rulings on assertions of privileges and immunities available under the law of the Requested State but not with regard to those available under the law of the Requesting State. Assertions of those privileges and immunities are, instead, to be preserved for decision by the courts of the Requesting State. The question of whether failure to raise a claim constitutes a waiver is left to the law of the Requesting State as well.[13]

The second paragraph obligates the Requested State to notify the other State of the date and place where the request will be executed.

The third paragraph obligates the Requested State to permit the accused, his attorney, and "any other interested person

specified in the request" to be present at the execution of the request. "Interested person" includes a prosecutor, case agent, expert, special master, etc. Note that the Requested State need not grant the accused safe conduct to attend the taking of testimony. If the accused chooses to enter the Requested State in which he may be subject to incarceration or detention, the accused accepts that risk. Generally, the United States is able to get permission for suitable arrangements not requiring the presence of the accused (i.e., telephone connection between him and his counsel present at the proceeding).

The final paragraph gives persons permitted to be present the opportunity to pose questions for the witness to answer, in accordance with applicable procedures in the Requested State.[14] Under Belgian law and practice, it is anticipated that the judicial officer responsible for executing the request may either require all of the questions to be given to him so that he can ask them of the witness or, if he so chooses, he may allow the persons present to question the witness directly.[15]

### Article 7 -- Executing Requests for Search and Seizure

This Article obligates each State to conduct searches and seizures at the request, and for the benefit, of the other. The requirement that the search and seizure be executed in accordance with the law of the Requested State is understood, on the U.S. side, to include Constitutional requirements.

Belgian law allows its authorities to conduct a search and seizure for another country only for an "extraditable" offense, meaning that there must be dual criminality and the offense must be punishable in both States by more than one year in prison. The Belgian delegation assured the United States delegation that in determining dual criminality, Belgium would look only to the essential elements of the offense and would not consider as essential an element such as use of the mails, interstate or foreign commerce, etc., since those elements are commonly found in the United States statutes solely for federal jurisdictional purposes.[16]

The second paragraph grants the Requested State authority to condition the delivery of seized items to the Requesting State on assurances that they will be returned promptly. The provision makes clear that in the absence of such conditions, the Requested

State is not obligated to return the property and may dispose of it as provided by its law (e.g., through forfeiture, restitution, etc.).

The last paragraph grants the Requested State authority to fashion appropriate conditions prior to transferring seized items to the Requesting State in order to make sure that the interests of a third party in that property are protected.

**Article 8 -- Procedures Concerning Admissibility of Evidence**

This Article, which was included primarily for the benefit of the United States, ensures that Belgian authorities will certify or authenticate the requested items, including documents and records, in a manner designed to establish a proper foundation for their admission into evidence under U.S. law.

The first paragraph of this Article permits the United States to specify the procedures to be followed and the forms to be used for the certification or authentication of the items in executing a request under Article 5, 6, or 7.[17] By way of example, the United States intends to ask Belgium to certify "records of a regularly conducted activity," as defined by 18 U.S.C. 3505, pursuant to a "3505" form supplied by the United States.[18] Belgium is required to honor the terms of the request unless doing so would be in violation of its law.[19]

The second paragraph establishes procedures to be used in order for items seized by Belgium to be admitted into evidence in the United States without having to establish the chain of custody by means of deposition or live testimony. After a search warrant is executed in Belgium, the evidence seized is taken to the Clerk of the Court which issued the warrant. The Clerk will keep the evidence until it is given to the designated United States agent and will, also, provide attestations using the form appended to the Treaty (a copy of which is included in the appendix to this analysis) executed by each person who had possession of the items at any time after they were seized. While the form will not be executed under oath or before a notary or magistrate in Belgium, the person executing it would be subject to prosecution in Belgium if he gives false information. The penalty would be punishment by imprisonment for 5 to 10 years if the person executing it is not a governmental official (e.g., the owner of a garage in which a seized automobile was kept); if

he is a governmental official, the penalties would be even greater.

The second paragraph further provides that those attestations shall be admissible in evidence in the United States "as proof of the truth of the matters set forth therein" and that no further "attestation shall be required." The purpose of this is two-fold: first, to indicate that the courts retain full authority to rule on the admissibility of the proffered evidence with regard to materiality, relevance, etc.; second, as a direction to the courts that, if the seized items have been provided pursuant to this paragraph and are otherwise admissible, they should not be excluded because the attestation is technically or substantially different from other recognized forms of certification or authentication. No implementing legislation is needed; the prosecutor will move admission of the attestation(s) under rule 803(24) of the Federal Rules of Evidence.

During the negotiations, careful thought was given to the feasibility of appending other standard certification forms to the Treaty, as has been done in other MLATs. For instance, our MLAT with Thailand[20] provides forms to certify business records (Article 8(5)) and records of a government office or agency (Article 9(3)), as well as articles seized pursuant to a search and seizure (Article 11(2)). Ultimately, the negotiators agreed not to include those forms in favor of making the Treaty as flexible as possible.

In this connection, other types of certifications and authentications the United States intends to request of Belgium in order to provide a foundation for evidence obtained under the Treaty include those:

1. established or permitted by the Rules of Evidence or by a statute such as 18 U.S.C. 3505;[21]

2. contained in or appended to other MLATs ratified by the United States in a similar manner and for the same purpose as provided in those treaties[22], examples of which are included in the appendix to this analysis; and

3. available under other treaties and multilateral conventions currently in force or which may enter into

force relating to certification, authentication, or legalization of documents.[23]

As noted previously, implementing legislation is unnecessary inasmuch as it is intended that established procedures will be followed for offering and determining admissibility of evidence so certified or authenticated. See, e.g., 18. U.S.C. 3505 and Rules 804(b)(5) and 901 of the Federal Rules of Evidence.

The last paragraph in this Article, paragraph 3, is an instruction to the Central Authorities to consult with regard to difficulties arising under this Article. This provision is included primarily for the benefit of Belgium which indicated concern about whether its Central Authority would be able to understand our requests in light of its having no experience in dealing with common law rules of evidence. Moreover, Belgium contemplates that its executing authorities will work closely with U.S. law enforcement authorities in executing requests for search and seizure so that chain of custody requirements pose minimal administrative burdens for Belgium. However, in such instances, the U.S. Central Authority must be involved and cannot simply delegate its responsibility to the U.S. law enforcement authority involved.

**Article 9 -- Transferring Persons in Custody in the Requested State to the Requesting State**

and

**Article 10 -- Transferring Persons in Custody in the Requesting State to the Requested State**

These two Articles deal with the situation in which a person incarcerated in one State is needed as a witness or for confrontation or other purposes in the territory of the other. On some occasions ad hoc arrangements are made to permit the person to be escorted to the other country, testify at the trial or other proceeding, and then return to the country of incarceration.[24] These Articles establish the procedures for this to occur on a routine basis. Article 9 provides for a person incarcerated in the Requested State to travel to the Requesting State, commonly to appear as a witness at trial. Article 10 provides for a person incarcerated in the Requesting

State to travel to the Requested State, commonly for purposes of confrontation.

Both Articles allow transfer of such a person, provided both the Requested State and the person to transfer consent. It is noted that the Treaty does not alter the right of either Party to refuse to permit a transfer. There have been recent situations in which a person in custody in the United States has demanded permission to travel to another country to be present at a deposition being taken there in connection with his case.[25] These demands are often denied by the foreign country involved, and it was not the intention of the negotiators to interfere in any way with each Party's unfettered discretion to accede to or deny such requests.

Article 9 provides in paragraph two that the Requested State may postpone transfer of a person for such length of time as his presence in the Requested State is necessary in connection with an ongoing investigation or prosecution. Both Articles authorize the State into which the person transfers to keep him in custody while he is there and to return him to the other as soon as possible (unless the two States agree otherwise). Neither State may refuse to return such a person because of his nationality.

### Article 11 -- Application of Articles 9 and 10

This Article reflects agreements concerning implementation of Articles 9 and 10 and specifies some additional obligations arising in a transfer situation.

The first paragraph establishes that the person transferred is entitled to have the time spent on transfer credited against his sentence so that he is not penalized for agreeing to cooperate. It further grants safe conduct (i.e., the prisoner cannot "be prosecuted, detained or subjected to any other restriction of personal liberty" for acts or convictions which occurred prior to transfer).[26] This protection lasts for a period of 15 days after the person has had "an opportunity to leave the State to which he has been transferred," thus providing for the situation in which the sentence imposed by the country from which the prisoner was transferred expired while he was in the receiving State. The protection also expires when the person departs (voluntarily or under compulsion) from the State into which he had transferred.

The second paragraph obligates the receiving State to arrest the transferred person if he escapes while on transfer. The last paragraph provides that extradition proceedings are not required in order to effect the return of a person who has been transferred.

**Article 12 -- Proceeds of Crime and Restitution to Victims**

This Article dealing with restitution to victims and locating, tracing,[27] immobilizing, and forfeiting the proceeds of crime[28] was the subject of protracted discussions during the negotiations.[29] Both Parties intended for the Treaty to provide as much assistance as possible under current laws and also under such new laws as may be enacted in the future in this rapidly developing area of criminal justice. Thus, the obligation to assist includes all types of assistance, except that neither Party agreed to be obligated by the Treaty to: (1) transfer forfeited property to the other State; (2) transfer property to the other State where forfeiture proceedings would be instituted; or (3) institute and prosecute claims on behalf of the other State for forfeiture or claims for restitution.

The United States delegation explained that the Anti-Drug Abuse Act of 1986[30] ("the Act"), expanded the authority of the United States to allow it to seize and forfeit property

> which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale,or distribution of a Controlled Substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offence or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States. [18 U.S.C. 981(a)(1)(B).]

The Belgian delegation indicated that Belgium would be able to grant assistance to the United States in locating, tracing, and immobilizing assets forfeitable under this new law. It further indicated that it would assist in the forfeiture of such assets

by providing evidence (including documents and records) needed to establish the property's forfeitability.

The United States delegation also explained that this Article would permit the equitable sharing of forfeited assets pursuant to 18 U.S.C. 981. Under regulations to be promulgated by the Attorney General, an equitable share will generally reflect the direct or indirect contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The Act requires that these provisions operate only "to the extent provided for by Treaty" and pursuant to "treaties providing for the transfer of forfeited properties to the foreign country." 18 U.S.C. 981(a)(1)(B) (1986).

The second paragraph of this Article obligates each State to notify the other State of proceeds of crime believed to be located in the territory of the other State and for the State notified to determine whether any action would be appropriate and report to the other as soon as possible on the action taken.

### Article 13 -- Limitations on Assistance

The first paragraph of this Article establishes three bases upon which the Requested State may refuse to grant assistance: (1) execution of the request would prejudice the sovereignty, security or other essential public interests of the State; (2) the request relates to an offense under military law which would not be an offense under ordinary criminal law; or (3) the request was not made in conformity with the Treaty.

The first is intended to allow the Requested State to avoid granting assistance which would be offensive to its basic institutions, violate its notions of fundamental justice and fair play, or threaten its security. It is not intended to permit refusal of a request for inconsequential reasons. The Belgian delegation equated this in part to the concept of ordre public. Denial on this basis for Belgium would require a finding by the Belgian Central Authority that granting assistance would affect a public institution in a particularly disruptive manner.

The second basis relates to military offenses: a request for assistance in the investigation or prosecution of a military offense may be refused if the offense is one not found in

ordinary criminal law. For instance, assistance should be granted under this provision in a case involving a serviceman being court martialed for theft; the Requested State, however, could refuse assistance if he were being court martialed for insubordination.

The final basis for refusal established by paragraph one is that the request was not made in conformity with the Treaty. The importance of this clause, aside from the obvious, is that of expressly granting the Requested State authority to waive defects.

The second paragraph establishes another basis for refusing assistance, allowing the Central Authority of the Requested State to deny a request "if it involves a political offense." However, the paragraph also states expressly that assistance should not be denied for offenses which Belgium and the United States have agreed in other agreements not to consider political. This paragraph was proposed by the Belgian delegation and discussed at length. The United States delegation posed four situations involving potential political offenses in order to obtain a better understanding of how Belgium would apply this paragraph:

1. An espionage case [involving a foreign agent of a third state (unfriendly to both the United States and Belgium) spying on NATO headquarters]: the Belgian delegation indicated that assistance would be granted;

2. An export control case [involving a foreign agent of a third state (unfriendly to both the United States and Belgium) illegally shipping arms from the United States through a front in Belgium to that third state]: the Belgian delegation indicated that assistance would be granted;

3. Another espionage case [involving an unauthorized entry into government data banks (computer crime)]: the Belgian delegation indicated that assistance would be granted; and

4. An investigation into a government's handling of its responsibilities [involving an investigation similar to the Irangate investigation]: the Belgian delegation indicated that assistance could be granted (depending on how much information was available showing that a crime ordinarily found in the criminal codes of free

and democratic societies was being investigated) but that this would be the most difficult case of the four.

As these responses show, the language used in this Treaty means something different from similar language found in extradition treaties.[31] It allows the Requested State to avoid becoming embroiled in political matters of the Requesting State and allows the Requested State to refuse assistance for requests which are motivated by improper political considerations.[32] It is not intended, however, to prevent assistance from ordinarily being given in cases involving espionage, sabotage, and treason.[33]

The second sentence of this paragraph, relating to offenses not considered political under other international agreements, is principally a reference to the Extradition Treaty and its Protocol signed by the United States and Belgium in 1987.[34] Those two agreements, read together, exclude from the definition of political offenses those crimes of violence typically associated with terrorism. They also exclude crimes against the head of state or his family and crimes included in multilateral conventions to which both states are parties which provide that the culprit must be either extradited or prosecuted.

It is noted that the Treaty does <u>not</u> obligate the Requested State to deny assistance for any of the foregoing reasons. Instead, it <u>empowers</u> the Requested State to deny assistance as a matter of discretion. This discretionary authority to grant or deny assistance was explicitly given to the executive branch rather than to the judiciary. The primary reason for this is that not all forms of assistance involve the courts.[35] It is noted that the court has inherent authority to satisfy itself that the Central Authority made its decision after fully considering all relevant issues. The court may not, however, substitute its discretion for that of the Central Authority under this language.[36]

The third paragraph provides that before the Requested State either denies or postpones a request, it must consult with the Requesting State to see if a satisfactory arrangement can be devised to permit immediate assistance. Any agreement reached in these consultations conducted through the Central Authorities must be respected. The fourth paragraph allows the Requested State to postpone (but

not deny) assistance in order to avoid interference with an investigation or prosecution in the Requested State. The last paragraph provides that the Central Authority of the Requested State must promptly inform the other Central Authority of the reason for denying or postponing a request.

### Article 14 -- Protecting Confidentiality

This Article obligates the Requested State to keep the contents of a request confidential if the Requesting State so requests. If compliance with the request is not possible, the Requested State is to consult with the Requesting State concerning whether to proceed with execution.

In discussing this provision, the negotiators considered whether the Treaty should regulate the use to which the Requesting State may put the evidence or information it receives. It was agreed that the Treaty would not contain any such restrictions, thus allowing the Requesting State to use the evidence or information for any purpose. Given that the Treaty requires dual criminality only for search and seizure in Belgium, use restrictions, at least insofar as such limitations would apply to other criminal offenses, are rather meaningless. The Central Authorities need be concerned only that the initial request is for a proper purpose under the Treaty. See Article 15(1)(d). However, conditions imposed in accordance with Article 5(b) may restrict subsequent use by the requesting State.

### Article 15 -- Contents of Requests

This Article is a self-explanatory listing of items to be included in requests. The information to be provided is similar to that required for requests in other U.S. MLATs and is virtually identical to Article 13 in the U.S.-Netherlands MLAT.[37]

**Article 16 -- Executing Requests and Return of items**

The first paragraph of this Article obligates the Central Authority of the Requested State to execute the request itself or send it to the appropriate competent authority for execution promptly. The Treaty contemplates that the Central Authority which receives a request will first review it and, if it is of the opinion that the request does not comply with the Treaty's terms, immediately notify the Central Authority of the Requesting State. If the request does satisfy the Treaty's requirements and the Central Authority can provide the assistance itself, that authority will comply with the request promptly. If the Request meets the Treaty's requirements but its execution requires action by some other authority in the Requested State, the Central Authority will promptly transmit it to that authority, which is obligated to use its best efforts to execute it. U.S. federal agents, attorneys, and courts will normally execute Belgian requests. State and local authorities are also bound to assist when necessary (for instance, when records of convictions from local courts are requested). The authority executing the request is authorized to take whatever action within its power is necessary in order to execute it.

The paragraph also provides that the courts of the Requested State shall have jurisdiction to issue necessary process. This provision serves several different purposes. First, it authorizes state and local courts, to the extent that they are called upon to execute a request, to issue necessary process. Second, it provides slightly broader authority than 28 U.S.C. 1782 for U.S. federal courts to use their power to issue subpoenas and other process when Belgium needs evidence for use before an administrative agency, as might be the case in connection with a Belgian forfeiture proceeding under Article 12 of the Treaty.[18]

Article 16(2), identical to Article 12(2) of the U.S.-Netherlands treaty,[19] provides that the Requested State is to execute the request pursuant to its own laws, practices, and procedures, except that specific procedures asked for in the request will be honored unless prohibited by domestic law. For instance, if the Requesting State asks that a deposition be video taped, the Requested State should do so unless its law prohibits video taping such proceedings.

The third paragraph allows the Requested State to substitute copies of documents for originals unless the Requesting State specifically requests that the originals be provided. The last paragraph obligates the Requesting State to return any items furnished, unless the Requested State waives their return, except for items seized pursuant to a search warrant, in which case arrangements for their return are to be made pursuant to Article 7(2), as discussed previously.

### Article 17 -- Central Authorities

The Attorney General of the United States and the Minister of Justice of Belgium are the Central Authorities for purposes of the Treaty.[40] The scheme established by the various provisions of the Treaty calls for them to exercise control over the making of requests, to determine whether the requests meet the requirements of the Treaty and, if not, whether to grant assistance as a discretionary matter. The provision in this Article that they shall communicate directly with each other ensures that they remain in close contact with regard to the implementation of the Treaty and the processing of individual cases.

### Article 18 -- Costs and Translations

This Article dealing with costs and translations is self-explanatory.

### Article 19 -- Other Treaties and Domestic Laws

This Article provides that assistance available under the Treaty may also be provided pursuant to other agreements, arrangements, or practices. This is to ensure that existing and future working arrangements are not affected in any manner by this Treaty.

**Article 20 -- Entry into Force and Termination**

The last article contains standard language concerning ratification, the exchange of instruments of ratification, entry into force, retroactivity, and termination of the Treaty.

## APPENDIX

FORM [41]

I, the undersigned, [Name and Title or Position], attest on penalty of criminal punishment for false statements or attestation that I:

-- seized the articles listed below from [person] on [date] at [place] *

-- received custody of the articles listed below from [person] on [date] at [place] *

Description of articles:

I declare that I relinquished custody of those articles on [date] at [place] to: [Name(s) Title or Position].

I declare that, while they were in my custody, these articles were:

-- in no way altered. *

-- altered in the following manner: *

DONE this _____ day of _____, ____, at [place].

[signature]

* cross out the inapplicable statements

## APPENDIX

CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS [42]

I the undersigned: _____,

understanding that I am subject to criminal penalty under the law of Belgium for an intentionally false declaration, declare that I am employed by/associated with: _____

_____ in the position of: _____

and by reason of my position am authorized and qualified to make this declaration.

I further declare that the documents attached hereto are originals or true copies of records which:

1. were made, at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters;
2. were kept in the course of a regularly conducted business activity;
3. were made by the said business activity as a regular practice; and,
4. if not original records, are duplicates of original records.

The originals or duplicates of these records are maintained in the country of: _____.

Date of execution: _____

Place of execution: _____

_____
[signature]

APPENDIX

ATTESTATION OF AUTHENTICITY OF FOREIGN PUBLIC DOCUMENTS [43]

I, [Name], attest on penalty of criminal punishment for false statement or attestation that my position with the Government of Belgium is [Official Title] and that in that position I am authorized by the law of Belgium to attest that the documents attached and described below are true and accurate copies of original official records which are recorded or filed in [Name of Office or Agency], which is a government office or agency of Belgium.

Description of Documents:

[Signature]

[Title]

[Date]

## ENDNOTES

1. Treaty between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, 27 UST 2019, TIAS 8302 (entered into force January 23, 1977); Treaty between the United States and the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, 32 UST 311, TIAS 9891 (entered into force January 1, 1981); Treaty between the United States and the Kingdom of the Netherlands, together with a Related Exchange of Notes, June 12, 1981, TIAS 10734 (entered into force September 15, 1983); Treaty between the United States and the Italian Republic on Mutual Assistance in Criminal matters, together with a Related Memorandum of Understanding, November 9, 1982, TIAS ____ (entered into force November 13, 1985).

2. Treaty between the United States and Canada on Mutual Legal Assistance in Criminal Matters, March 18, 1985; Treaty between the United States and the United Mexican States on Cooperation for Mutual Legal Assistance, December 9, 1987; Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, March 19, 1986; Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands on Mutual Assistance in Criminal Matters, July 3, 1986; Treaty between the United States and the Bahamas on Mutual Assistance in Criminal Matters, June 12, 1987, and August 18, 1987.

3. See, note 2.

4. Both delegations agreed that the term "investigation" includes grand jury proceedings, and investigations prior to grand jury proceedings, in the United States. Moreover, administrative investigations are also covered, provided that the administrative proceedings are related to criminal prosecutions (e.g., forfeiture proceedings).

5. The negotiators specifically agreed that this agreement does not establish a basis for assistance for general civil, commercial, or administrative matters (i.e., those matters unrelated to the suppression of offenses).

6. Dual criminality is a principle often found in extradition treaties generally prohibiting extradition if the conduct forming the gravamen of the offense in the Requesting State would not have been illegal if performed within the jurisdiction of the Requested State. See Collins v. Loisel, 259 US 309, 312 (1922); Cucuzzella v. Keliikoa, 638 F.2d 105, 108 (9th Cir. 1981).

7. It was agreed, nevertheless, that the Central Authority of the Requesting State has authority to screen requests to ensure that only those worthy of international judicial assistance will be presented.

8. This provision may be unnecessary inasmuch as the Central Authority of the Requested State has the ability under Article 13(1)(a) to refuse such requests as contrary to the public interest of the State. Nevertheless, including this provision in the Treaty was felt to be desirable in that it (1) constitutes a directive to the Requesting State not to make such requests and (2) reduces the number of instances in which the Requested State will find it necessary to invoke its authority to refuse a request as being contrary to the public interest, preserving that

provision's use for cases more clearly involving matters of national security, etc.

9. This clause reflects the desire of the negotiators to avoid the creation of new rights or the alteration of existing rights available to the defense or private parties. Simply stated, this means that a private party wishing to oppose execution of a request must base his opposition on something other than the provisions of the Treaty; if a private party wishes to suppress or exclude evidence obtained under the Treaty, he must base his arguments on something other than the provisions of the Treaty.

10. The phrase "make thorough efforts" was agreed to mean that the parties are required to do what is reasonable under the circumstances to locate or identify the individual.

11. The determination of whether the person's presence is "particularly" necessary is to be made by the Requesting State.

12. Belgium has authority under its law to compel a witness to appear and give a statement under oath (either prior to or after filing of charges). If the statement is taken under oath and the witness lies, he can be prosecuted for perjury.

13. See, e.g., R. & J. Dick Co. v. Bass, 295 F.Supp. 758 (N.D. Ga. 1966), a case involving a federal court in Georgia in a diversity action being requested by a Pennsylvania court to take the deposition of persons located in Georgia who had no privilege under Georgia law to refuse to testify but might have a privilege under Pennsylvania law (where the suit was pending).

It is noted that the court may protect the witness' rights under foreign law by an appropriate order, if necessary. For instance, in the R. & J. Dick Co. case, supra, the court ordered:

> IT IS ORDERED, therefore, that the deposition proceed, but solely upon the condition that all copies thereof, when transcribed, be sealed and delivered to the clerk of this court, and that the contents thereof be not divulged or disclosed by either of the parties or their counsel to any other person or persons pending a ruling by the court as to what portions of such deposition, if any, shall be admitted in evidence.

14. These two paragraphs grant the United States rights not currently existing in Belgian law. Under Article 73 of the Belgian Code of Criminal Procedure, a witness is heard in secret, and counsel for the accused is not permitted to question him. Therefore, these paragraphs change Belgian law to assure that the United States requirements with regard to cross-examination of the witnesses are met.

15. Current Belgian practice is for the judge to control the taking of testimony and ask all questions. In fact, the Belgian proceeding is inquisitional and not adversarial and, therefore, providing an opportunity for a defendant or counsel to pose questions, or even to be present, is a substantial change in Belgian practice. When a deposition is taken in Belgium pursuant to the Treaty, the defense should anticipate preparing written questions to be provided to the examining magistrate in advance of the deposition. This requirement is not uncommon to depositions taken in

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other foreign jurisdictions.

16. The U.S. delegation noted that the new U.S.-Belgium extradition treaty has a "federal jurisdiction" clause and inquired whether such a provision was necessary in this Treaty; the Belgian delegation indicated that it would not be necessary and assured the U.S. delegation that the U.S. statutes would be properly construed under both treaties.

In this regard, on October 23, 1987, the U.S. delegation gave the Belgian delegation copies of the following U.S. statutes, translated into French, for the purpose of discussing them to make certain that the U.S. could reasonably expect to receive assistance, including a request for search and seizure, for any investigation or prosecution arising under:

TITLE 18 OFFENSES:

1. 18 U.S.C. 2
2. 18 U.S.C. 371
3. 18 U.S.C. 1341
4. 18 U.S.C. 1961
5. 18 U.S.C. 1962
6. 18 U.S.C. 1963
7. 18 U.S.C. 2314
8. 18 U.S.C. 3282

DRUG OFFENSES:

9. 21 U.S.C. 812
10. 21 U.S.C. 841
11. 21 U.S.C. 843(b) and (c)
12. 21 U.S.C. 846
13. 21 U.S.C. 848
14. 21 U.S.C. 952
15. 21 U.S.C. 960
16. 21 U.S.C. 963

TAX OFFENSES:

17. 26 U.S.C. 7201
18. 26 U.S.C. 7203 [although dual criminality exists, this offense is a misdemeanor and Belgium cannot, under its law, provide assistance involving a search and seizure if it is the only offense at issue]

19. 26 U.S.C. 7206

CODE OF FEDERAL REGULATIONS

20. 21 C.F.R. 1308.11
21. 21 C.F.R. 1308.12

Whether U.S. law likewise requires dual criminality in order for U.S. authorities to execute a search warrant on behalf of a foreign authority is a question which has yet to be addressed by our courts. Therefore, the negotiators have been careful <u>not</u> to include a dual criminality requirement for the United States in the Treaty but, also, to use language to avoid having the provision found to be unconstitutional in the event a court does determine dual criminality to be constitutionally required. Specifically, the sentence "The search and seizure shall be carried out in accordance with the laws of that State" is intended to mean that the foreign request must, among other things, comply with our constitutional requirements. The opening phrase, "To the extent permitted under its laws. . ." has also this same intention.

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17. This Article is primarily for the benefit of the United States inasmuch as Belgian rules of evidence rarely require foundations to be laid or for other formalities to be met in order for the material to be used as evidence. To the extent that Belgium does make requests for specific procedures under this Article, of course, the United States is equally bound to honor them.

18. See United States v. Miller, 830 F.2d 1073 (9th Cir. 1987).

19. In discussing this matter with the Belgian delegation, the United States delegation was unable to hypothesize a request for special procedures necessary under U.S. law which would be violative of Belgian law. This is not to say that the special procedures would not be cumbersome.

20. Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986.

21. The form in the appendix, CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS, is based on the form used in United States v. Miller, 830 F.2d 1073 (9th Cir. 1987). The court in Miller found the records so certified to have been properly admitted into evidence pursuant to 18 U.S.C. 3505.

22. See the forms contained in the Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986; the Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands on Mutual Assistance in Criminal Matters, signed at Grand Cayman on July 3, 1986; and the Treaty between the United States and the Bahamas on Mutual Assistance in Criminal Matters, signed at Nassau on June 12, 1987, and August 18, 1987.

23. An example is authentication under the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, done at the Hague October 5, 1961, entered into force for the United States October 15, 1981, T.I.A.S. 10072, 527 UNTS 189. Documents so authenticated would be offered for admission under Rule 902(3) of the Federal Rules of Evidence.

24. For example, on January 23, 1986, federal prisoner Edward Hayes Ward was temporarily released from the Federal Correctional Institution at Talladega, Florida, to travel to Nassau, the Bahamas, and testify for the Government at a preliminary inquiry in the case of Commissioner of Police v. George Smith and Everette Bannister, Case No. 4948-85. Ward was accompanied by DEA agents, who saw to his security and insured his prompt return to the United States when his testimony was no longer needed.

25. See, United States v. Sines, 761 F.2d 434 (9th Cir. 1985); cf. United States v. Johnpoll, 739 F.2d 702 (2nd Cir. 1984); United States v. King, 552 F.2d 833 (9th Cir. 1976).

## ENDNOTES

26. See, discussion of Article 4 with regard to an explanation of safe conduct in which it is noted that safe conduct is not provided for witnesses not incarcerated who voluntarily travel to the Requesting State.

The Belgian delegation proposed inclusion of this safe conduct provision for prisoners who have been transferred under either articles 9 or 10. The United States delegation agreed, perceiving this situation to be somewhat different from that involving potential witnesses who are not in custody.

27. The words "locate" and "trace" are both used to make clear that assistance under this article includes locating the property physically, as well following the proceeds through transactions (e.g., from cash to jewelry to real estate).

28. The term "proceeds of crime" is intended to include all property obtained directly or indirectly as a result of the commission of an offence (e.g., art work purchased with drug profits).

29. It was specifically agreed that assistance under this Article would not include the recognition and enforcement of fines. Whether assistance such as assisting the Requesting State locate funds within the territory of the Requesting State from which a fine might be satisfied (e.g., a situation in which the United States needs bank records from Belgium in order to trace the defendant's assets to an account in the United States) was not discussed. It is the belief of the U.S. negotiators that the language of the Treaty appears broad enough to allow such assistance and should be granted (absent an express prohibition in the domestic law of the Requested State).

30. Pub.L. 99-570, Title I, Section 1366(a), October 27, 1986, 100 Stat. 3207.

31. For a discussion of "political offense" as that term is commonly used in extradition situations, see, Quinn v. Robinson, 783 F.2d 776, (9th Cir. 1986), cert. den., __ U.S. __, 107 S.Ct. 271; Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

During the negotiations sound policy reasons for distinguishing between giving assistance under a mutual legal assistance for a political offense and extraditing a person for a political offense were noted.

In the first place, international law, as reflected in the Protocol Relating to the Status of Refugees, done at New York January 31, 1967, entered into force for the United States November 1, 1968, 19 UST 6223, TIAS 6577, 606 UNTS 267, prohibits returning a person to a country where he will be persecuted unless he has committed a serious "non-political" offense; usually whether the offense was political or not is determined during the course of an extradition hearing. There is no similar body of law with regard to mutual legal assistance.

In the second place, since Belgium and the United States are close allies, it is in the interests of both states to make available evidence and information useful in prosecuting persons who have committed espionage, sabotage, or treason, or who are involved in illegally shipping high technology equipment to unfriendly nations. Further, it is noted that currently there is no prohibition in the domestic law of either State against rendering assistance in such cases; thus, any prohibition in the Treaty would be novel and counterproductive.

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32. Extradition law has long distinguished between political offenses focusing on the nature of the offense and political motivation focusing on the reasons the state requesting extradition made the request. For cases discussing "political motivation" in the extradition context, see, Sindona v. Grant, 619 F.2d 167 (2nd Cir. 1980); Jhirad v. Ferrandina, 536 F.2d 478 (2nd Cir. 1976), cert. den., 429 U.S. 833.

33. It is noted that in extradition law these offenses are generally considered to be "pure" political offenses for which extradition must be denied. See Quinn v. Robinson, 783 F.2d 776, 793-94 (9th Cir. 1986), cert. den., __ U.S. __, 107 S.Ct. 271.

34. Supplementary Treaty on Extradition to Promote the Repression of Terrorism between the United States and Belgium, signed in Washington, D.C., on March 7, 1987; Treaty between the United States and Belgium on Extradition, signed in Brussels on April 27, 1987.

35. For instance, if Belgium were to request the United States to make available certain arrival and departure records maintained by the Immigration and Naturalization Service concerning aliens, there would be no basis or necessity for involving a court.

36. Of course, nothing in the Treaty could require a court to execute a request when doing so would be contrary to the Constitution of the United States. See Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). This provision is also favorable for the United States inasmuch as it gives greater assurance that a Belgian court will not refuse assistance.

37. Signed at The Hague on June 12, 1981, TIAS 10734 (entered into force September 15, 1983).

38. The United States Court of Appeals for the Second Circuit has ruled that in order for a court to execute a foreign request for evidence the requirement of 28 U.S.C. 1782 that the evidence be for use before a tribunal in that foreign state is to be applied strictly such that assistance could not be granted on behalf of an administrative agency. Fonseca v. Blumenthal, 620 F.2d 322 (2nd Cir. 1980); In Re Letters Rogatory Issued by the Director of Inspection of the Government of India, 3815 F.2d 1016 (2nd Cir. 1976).

39. See note 38, supra.

40. By published regulations, the Attorney General has delegated his authority under such treaties to the Assistant Attorney General for the Criminal Division, who, in turn, has redelegated the authority to the Deputy Assistant Attorneys General, Criminal Division, and the Director of the Office of International Affairs. 28 C.F.R. 0.64-1 and Directive No. 81 (44 FR 18661, March 29, 1979, as amended at 45 FR 6541, Jan. 29, 1980; 48 FR 54595, December 6, 1983).

41. This form is to be used to establish chain of custody of articles seized pursuant to Article 8 and is included in the Treaty.

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42. This form is intended for use in connection with 18 U.S.C. 3505 records. It is not included in the Treaty.

43. This form is to be used primarily in connection with Article 5 of this Treaty, Providing Records of Government Offices or Agencies. It is not included in the Treaty.

# Senate of the United States

IN EXECUTIVE SESSION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty between the United States of America and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 28, 1988.

## ADDITIONAL VIEWS OF SENATOR JESSE HELMS

The major issue with respect to the Mutual Legal Assistance Treaty with Belgium is the protection of the constitutional rights of United States citizens.

Both the committee report and the administration's witnesses insist that the MLAT's are an effective means of obtaining legal assistance. The effectiveness comes in part from streamlining the process of obtaining justice. That is also the major problem associated with these treaties. The MLAT's change and challenge constitutional processes as they relate to individual rights under the Constitution.

No other country protects the rights and freedoms of United States citizens in the way that the U.S. Constitution does. The major protections are found in the Bill of Rights. Despite what the committee would have us believe, these protections deal not with substantive law but rather with process.

### NEED FOR CONSTITUTIONAL RESERVATION

It is for this reason that I offered a reservation identical to the Lugar-Helms reservation on the Genocide Convention which was approved by 93 Senators in February 1986. This reservation read:

> Nothing in this Treaty requires or authorizes legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States.

This reservation, if accepted, would be included in the instruments of ratification submitted to the other ratifying countries. Thereby, the constitutional rights of Americans would remain secure.

### UNANSWERED QUESTION OF CONSTITUTIONAL PRIMACY

The essential reason for such a proviso is the still unanswered question of whether the Constitution supersedes a treaty or whether a treaty can be held to be of equal force to the Constitution with respect to its provisions.

There is a continuing dispute among scholars as to whether the Constitution always prevails within the territorial boundaries of the United States and in foreign lands. In support of her contention that the courts have held the Constitution always to be supreme, the State Department witness could cite for the committee only one case: *Reid* v. *Covert* (1956), a case dealing with an executive agreement—not with a treaty. This important distinction was acknowledged by the State Department witness.

In *Reid*, the distinguished Supreme Court jurist John Marshall Harlan wrote in his concurring opinion that "I cannot agree with the suggestion that every provision of the Constitution must be

deemed automatically applicable to American citizens in every part of the world * * *. The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."

Although *Reid* v. *Covert* (1957) is the most recent case on the Constitution and its relationship to treaties, there are other cases which have either introduced new law in their time or muddied the waters of what was then current law.

OTHER CASES

Oliver Wendell Holmes, Jr., in his majority opinion in *Missouri* v. *Holland* (1920), literally dispensed with the tenth amendment as it related to treaties. He does, however, pose a question which indicates that the issue of treaties versus the Constitution is not wholly resolved by the statement: "The treaty in question does not contravene any prohibitory words to be found in the Constitution."

*Geoffroy* v. *Riggs* (1890) stands for the proposition that "The treaty power as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its Departments, and those arising from the nature of the Government itself. * * *" This is a generalized statement of *dicta* and obscures more than clarifies the relationship of treaties to the Constitution.

In *Hauenstein* v. *Lynham* (1880), the Court lumps the Constitution and treaties together, stating that they both are "part of the law of every state.* * *" In other words, both are the law of the land as expressed in Article VI of the U.S. Constitution.

In the landmark case of *Foster* v. *Nielson* (1829), the Supreme Court through the majority opinion of Chief Justice John Marshall held that treaties could be self-executing, though there was no precedent for this in U.S. law. The MLAT's are self-executing treaties, and it is not clear what constitutional restraints may be placed upon them.

In *Ware* v. *Hylton* (1796), Justice Cushing wrote that the treaty in question "is of equal force with the Constitution."

Needless to say, I wish that the Supreme Court had at some time conclusively determined that the Constitution is supreme in all cases. Since this determination has not been made, a reservation is necessary to assure that the constitutional rights of all Americans are not abridged by the execution of those treaties.

MEANS TO OBTAIN EVIDENCE

During consideration of the Genocide Convention in 1985, the Foreign Relations Committee adopted a reservation aimed at protecting the constitutional rights of Americans. Unless a similar reservation is attached to the treaty, the constitutional rights of Americans will unnecessarily be left at risk.

This treaty seeks to enhance national and international law enforcement interests and aims to overcome the alleged burdens placed upon governments attempting to control interstate criminality.

The treaty seeks to allow U.S. prosecutors to obtain some assistance from foreign countries in obtaining evidence, and other matters, of importance to prosecutions.

But this treaty also seeks to help foreign governments obtain evidence for their prosecutions. Other countries have different systems of law. And the Constitution of no other country protects the rights and freedoms of its citizens as does the U.S. Constitution.

Other countries could demand evidence from the United States that would not be admissible in our own courts under our Constitution. Or they could seek U.S. evidence relating to persons in their own countries just to see how much we know.

So, the question is this: Will this treaty unintentionally result in an infringement upon the Constitutional rights and freedoms of American citizens?

As these treaties are currently drafted, we can be certain there will be a full scale assault against American liberties. The group of lawyers most concerned with protecting the rights of U.S. citizens in courts abroad—the International Legal Defense Counsel—strongly opposed enactment of these treaties "as is" in hearing of the Senate Foreign Relations Committee.

The MLAT treaties will also help foreign governments obtain evidence for their prosecutions. But these same governments, some of which are corrupt (e.g. Mexico and the Bahamas), could demand evidence from the United States that would not be admissible in our own courts under the United States Constitution. They also could seek U.S. evidence relating to persons in their own countries just to see how much we know.

ADMINISTRATION FAILURE TO DEVELOP POSITION

The Principal Deputy Legal Adviser, Mary Mochary, in response to a question regarding the administration position on the constitutional issues raised by this treaty, failed to cite any original arguments and limited herself to reading from the majority report of the 100th Congress. Sadly that report put forward the following specious arguments:

> (1) The U.S. Supreme Court regularly and in a number of cases asserted the supremacy of the Constitution over treaties.
>
> (2) None of the MLAT's requires or authorizes legislation which is prohibited by the Constitution.
>
> (3) If we reserve the rights of our Constitution, other governments will reserve the rights of their constitutions which are based on different legal systems.
>
> (4) The MLAT's do not require new grounds for legal process, but merely provide mechanisms for the obtaining of evidence.
>
> (5) The defendants under the MLAT's are not excluded from legal assistance—only from the use of the treaties.

None of these assertions is cogent, as may be surmised from the following rebuttal:

> (1) The only Supreme Court case on the conflict between international agreements and the Constitution is *Reid* v.

*Covert,* and the meaning of that case is ambiguous as to treaties rather than to executive agreements as already explained in more detail above.

(2) The MLAT's do not recognize certain Bill of Rights guarantees such as the right to counsel and the privilege against self-incrimination.

(3) The main purpose of a constitutional reservation is to prevent the imposition of other countries' legal systems into the U.S. Constitution-based American legal system.

(4) The mechanisms provided by the MLAT's should be subject to the protections afforded by the U.S. Bill of Rights.

(5) The U.S. Government insists it needs the MLAT's because the method of letters rogatory is inadequate, but the Government also argues that letters rogatory—which it claims to be too slow and cumbersome—is good enough for defendants and others subject to the MLAT procedures.

For these reasons, I feel that if the MLAT treaties are to be approved, they must be subject to a reservation which would provide basic constitutional guarantees. Otherwise, they could subvert what Committee Report claims they are trying to protect.

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